STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission on its own motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs prudently incurred	)	
Illinois Commerce Commission on its own motion	)	
	)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Proceeding to review Rider 4, Gas Cost, pursuant to Section 9-244(c) of the Public Utilities Act	)	
Illinois Commerce Commission on its own motion	)	
	)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs prudently incurred	)	

RESPONSE OF NICOR GAS COMPANY
TO CITIZENS UTILITY BOARD'S AND COOK COUNTY STATE'S ATTORNEY'S OFFICE'S
PETITION FOR INTERLOCUTORY REVIEW

Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor Gas" or the "Company"), through its undersigned attorneys, hereby respectfully submits its Response to the Petition for Interlocutory Review of Citizens Utility Board ("CUB") and the Cook County State's Attorney's Office ("Cook County") (collectively, "CUB/Cook County"), which asks the Commission to reverse the January 15, 2004 Ruling of the Administrative Law Judges (the

"ALJs") requiring these parties to disclose specific relevant materials authored or reviewed by their testifying witness in this proceeding.

I.
Introduction

The Commission should uphold the ALJs' well-considered Ruling requiring CUB/Cook County to disclose specific relevant materials relied upon by their testifying witnesses, Jerome D. Mierzwa, in the preparation of his testimony, which these parties improperly have withheld in discovery in this proceeding. The discovery at issue is routine and plainly subject to disclosure under applicable law, including the Commission's Rules of Practice. As the ALJs recognized, it would be reversible error to deny the Company the fundamental due process right to test the opinions offered by Mr. Mierzwa in this proceeding based upon all the materials he authored or reviewed while preparing to give testimony.

Judge Haynes delivered the ALJ's Ruling, which stated as follows:

> After reviewing the parties' briefs and the case law, we have to agree that this supports Nicor's request for production of the reports prepared by Mr. Mierzwa, and also that the communications between the expert and [CUB] attorneys are not privileged either, and this is based on the distinction that the courts recognize between testifying and non-testifying experts, and we believe that Nicor's due process rights to fully cross-examine Mierzwa's expert opinion outweighs CUB's claim of privilege and the argument regarding what usual practice is here at the Commission, and so the motion is granted.

(Tr., pp. 44-45, Jan. 15, 2004). The Ruling is clear, concise, and correct, and the ALJs' sound discretion in disposing of the matter should be upheld.

Based upon Mr. Mierzwa's opinions, CUB/Cook County are seeking no less than $143 million in refunds from Nicor Gas in this proceeding. It is the Company's position that Mr. Mierzwa's opinions are factually and legally unfounded and, regrettably, reflect an

unprincipled approach to the issues presented based solely on hindsight, conjecture, and gross speculation. To be sure, the merits of Mr. Mierzwa's opinions, such as they are, are not at issue in the current discovery dispute. This much is certain, however. CUB/Cook County's refusal to cooperate in discovery and to disclose all the materials Mr. Mierzwa created or consulted while preparing his testimony, if allowed, would foreclose the Company's opportunity to test the opinions he is offering and prevent a determination on the merits.

As set forth in detail below, CUB/Cook County have offered no applicable legal authority or pertinent argument for their various and ever-changing arguments to justify their failure to meet basic standards of disclosure required of all parties in Commission proceedings.

- *First*, Mr. Mierzwa is not an attorney, and the materials in dispute are neither confidential attorney-client communications nor attorney work product. CUB/Cook County have put forward no factual or legal support for withholding Mr. Mierzwa's document on such basis.

- *Second*, the documents in question are indisputably relevant to the issues in dispute in this proceeding. It is essential that no party be allowed to pick and choose in discovery among the documents its opinion witness relies upon in preparing to testify for purposes of production. As the ALJs specifically recognized, disclosure of the materials now being withheld by CUB/Cook County is essential to the fundamental fairness of this process.

- *Third*, parties to Commission proceedings present opinion witnesses, like Mr. Mierzwa, literally everyday. These witnesses' value is the assistance they can render the Commission in its adjudication of highly complex facts. Such witnesses are subject to cross-examination to test whether the opinions they offer are reliable based upon *all* the available facts. The Commission's policy on discovery expressly recognizes this requirement. In short, there is nothing whatsoever new or unusual about the discovery at issue, and CUB/Cook County's unsupported arguments to the contrary should not be credited.

Finally, at a practical level, Nicor Gas has expended enormous time and expense responding to unprecedented discovery in this proceeding, including discovery into the materials written and reviewed by its testifying witnesses. Discovery in Illinois, including before the Commission, is liberal and open. *See* 83 Ill. Admin Code § 200.340. It also is *reciprocal*. In

their sound discretion, the ALJs have required no more of CUB/Cook County than that they cooperate in discovery on an equal basis. This sensible and legally correct result should stand.

II.
Procedural Background

The Company briefly restates the procedural facts to ensure the Commission a full understanding of the disputed discovery subject to the ALJs' Ruling.[1]

The undisclosed materials subject to the ALJs' Ruling include four reports written by Mr. Mierzwa that contain his analysis of facts and issues in dispute in this proceeding. These reports were identified but not produced by Cook County in discovery responses submitted in December 2003.[2] Additionally, the undisclosed materials include approximately 85 email communications between Mr. Mierzwa and CUB and its counsel, relating to the subject matter of Mr. Mierzwa's testimony. These materials were responsive to discovery served on CUB in August and October 2003. They were not disclosed by CUB until January 2004 during briefing on the Company's Verified Motion to Compel Discovery.

The Company and CUB/Cook County fully briefed the issues presented by the disputed discovery, which also was submitted to the ALJs for *in camera* review.[3] Staff also filed a short

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[1] Nicor Gas respectfully notes that the description of the discovery at issue and related procedure matters contained in the Petition is not complete or entirely accurate. (*See* Petition, pp. 4-5).

[2] *See* Nicor Gas's Verified Motion to Compel Discovery from CUB and Cook County, at Ex. 1. Mr. Mierzwa's documents were identified by Cook County in response to the Company's Second Set of Data Requests, not the First Set, as the Petition asserts. Moreover, only Cook County identified these materials. While the Company disagrees with Cook County's determination to withhold Mr. Mierzwa's reports, it is respectful of Cook County's specific identification of these reports. CUB did not identify Mr. Mierzwa's reports.

[3] *See* Verified Motion to Compel Discovery from CUB and Cook County (Jan. 5, 2004); Notice of ALJs' Ruling (Jan. 6, 2004); CUB/Cook County Verified Response to Motion to Compel (Jan. 9, 2004); Verified Reply In Support of Motion to Compel Discovery from CUB/Cook County (January 12, 2004).

advisory brief.[4] CUB/Cook County now take issue with the ALJs' determination to grant the Company's request for relief from the bench, rather than in a written opinion. (Petition, pp. 2, 14-15). CUB/Cook County, however, agreed both prior to hearing and on-the-record that oral argument was unnecessary, because the issues presented were addressed in full in the parties' briefs. Given the limited nature of the issues presented, the ALJs' determination to resolve the matter from the bench without further procedural delay was entirely appropriate.

III.
Argument

A. Mr. Mierzwa's Relevant Documents Are Not Subject To The Protections Of The Attorney Client Privilege Or the Attorney Work Product Doctrine

Before the ALJs, and in their initial objections to the subject discovery, CUB/Cook County's principal argument for withholding Mr. Mierzwa's documents was the purported protections offered by the attorney-client privilege or the attorney work product doctrine. While this argument has been relegated to a minor part on review (*see* Petition, pp. 10-13), the Company addresses it first, because CUB/Cook County relied upon it almost exclusively below. Their failure to support the protections asserted also is easily documented.

1. Mr. Mierzwa's Reports And Emails Are Not Attorney-Client Communications Under Illinois Law

As formulated by the Illinois Supreme Court, the attorney-client privilege functions as a bar to disclosure of qualifying "communications between a party or his agent and the attorney for the party." *See* Ill. Sup. Ct. R. 201(b)(2). The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and its legal counsel.

[4] *See* Staff's Response to Nicor's Verified Motion to Compel Discovery from CUB/Cook County (Jan. 12, 2004). Although it was untimely and Staff's rights were not at issue in the Company's discovery dispute with CUB/Cook County, the ALJs allowed Staff's response, and Staff was heard at the January 15, 2004 hearing. In their Petition, CUB/Cook County seek to rely upon selected quotations from a brief filed by Staff in a *separate* discovery matter between Staff and the Company. (Petition, pp. 7, 9). The Commission should not credit this form of unsupported third-party argument.

Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d at 103, 117-18, 432 N.E.2d 250, 256-57 (1982). Mr. Mierzwa is not an attorney or counsel to CUB or Cook County. Thus, the essential predicate of the privilege does not exist and the attorney-client privilege does not apply to the materials in dispute.

To avoid this result, CUB/Cook County argued before the ALJs that Mr. Mierzwa's documents and communications are protected from disclosure, because Mr. Mierzwa is a member of the "control group" for both organizations. Under Illinois law, however, a party's control group consists only of its "top management" and each "employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion … and whose opinion in fact forms the basis of any final decision by those with actual authority." *Consolidation Coal Co.*, 89 Ill. 2d at 120, 432 N.E.2d at 257-58 (1982). The ALJs unsurprisingly gave no credence to this novel proposition advanced by CUB/Cook County.

Based upon the Petition, it is unclear upon what basis CUB/Cook County now are asking the Commission to reverse the ALJs and find the existence of the attorney-client privilege with respect to Mr. Mierzwa's reports and emails. To the extent the argument can be discerned, it appears that these parties are asking the Commission to deem the disputed discovery as privileged, based upon Mr. Mierzwa's status as their so-called "legal agent." (Petition, p. 11). CUB/Cook County offer no further elaboration upon this undefined concept.

In response, Nicor Gas notes that Cook County has objected to other Company discovery in this proceeding on the basis that Mr. Mierzwa is *not* its agent.[5] Moreover, as a retained testifying witnesses, Mr. Mierzwa is or should be, at least in theory, independent of these

[5] *See, e.g.*, Cook County's Responses to Nicor Gas Company's First Set of Data Requests (Nov. 26, 2003) (stating Cook County "*objects to the description of Mr. Mierzwa as an agent*") (*emphasis provided*).

organizations. Most pointedly, as to Mr. Mierzwa's supposed status as these parties' "legal agent," Illinois law recognizes no such fiction.

Finally, even if Mr. Mierzwa were an attorney for these parties—or their "legal agent," whatever that may mean—any privilege attaching to the subject discovery would have been waived entirely based upon CUB/Cook County's identification of Mr. Mierzwa as a testifying witness. *People v. Wagener*, 196 Ill. 2d 269, 273-78, 752 N.E.2d 430, 434-37 (2001) (attorney-client privilege waived as to matters disclosed to testifying expert). CUB/Cook County previously relied upon *Wagener* for precisely this proposition in seeking and obtaining discovery from the Company, and they should not be allowed to take a contrary position now for their advantage or convenience.

2. Mr. Mierzwa's Relevant Documents Are Not Subject To The Limited Protections Of The Attorney Work Product Doctrine

Illinois law provides that "[m]aterial prepared by or for a party in preparation for trial is subject to discovery *only* if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. Sup. Ct. R. 201(b)(2) (*emphasis provided*). Thus, as codified and restated by the Illinois Supreme Court, the general rule requiring full disclosure of relevant matters applies to *all* materials prepared in anticipation of litigation, but only so long as these materials do not contain attorney opinion work product. *See Consolidation Coal Co.*, 89 Ill. 2d at 108-11, 432 N.E.2d at 252-53.

Illinois also recognizes a qualified protection against disclosure for the opinions and work product of consultants—*i.e.*, persons who have been retained or specially employed in anticipation of trial but who will *not* be called at trial. *See* Ill. Sup. Ct. R. 201(b)(3). Mr. Mierzwa is not a "consultant" to CUB/Cook County within the meaning of Rule 201(b)(3). *See, e.g., Nieukirk v. Bd. of Fire & Police Comm'rs*, 98 Ill. App. 3d 109, 113-14, 423 N.E.2d

1259, 1263-64 (3d Dist. 1981) (protections from discovery afforded to consultants' work product did not apply absent showing expected witness was intended to be non-testifying expert). CUB/Cook County do not dispute this point.

Thus, if Mr. Mierzwa wrote the reports at issue here and those reports reflect only *his own* theories, opinions and mental impressions, they are clearly not attorney work product and are discoverable under the broad rule of discoverability set forth in Sup. Ct. R. 201(b)(2). Because, as the ALJs correctly recognized in their Ruling, Mr. Mierzwa was never a non-testifying consultant, his documents are not subject to the protections afforded to non-testifying experts under Illinois law. *See* Ill. Sup. Ct. R. 201(b)(2-3). Under these circumstances, as a matter of well-established law, the documents should be disclosed.

CUB/Cook County assert that Mr. Mierzwa's reports and his communications with CUB and its counsel "contain information that discloses the legal theories, mental impressions and litigations of CUB/Cook County's attorneys." (Petition, p. 11) These parties, however, provided no support for this contention before the ALJs. Rather, they merely asserted that one of their attorneys requested that Mr. Mierzwa prepare these materials. (*See* CUB/Cook County Verified Response, at Aff. of Robert J. Kelter, ¶ 7). They have provided no support for this contention upon review. Under these circumstances, no privilege will be upheld.[6] *Krupp v. Chicago Transit Auth.*, 8 Ill. 2d 37, 42, 132 N.E.2d 532, 536 (1956).

In any event, even if Mr. Mierzwa's reports and emails do reflect attorney work product, presumably because CUB/Cook County communicated to Mr. Mierzwa their theories, mental impressions, or litigation plans, that would not be a proper basis for withholding those reports and emails from discovery. If CUB/Cook County shared attorney work product in writing with

their testifying witness, then they waived the protections ordinarily provided by the attorney work product doctrine.

This scenario has been considered extensively by the courts, and the weight of authority leaves no question that CUB/Cook County cannot bend the attorney work product doctrine to such a purpose.[7] It is critical that an adverse party have access to all information that shaped or potentially influenced a testifying witness's opinions, so that party can prepare full and effective cross-examination. *See Barna v. United States*, No. 95 C 6552, 1997 WL 417847 (N.D. Ill. July 23, 1997); *Karn v. Ingersoll-Rand Co*., 168 F.R.D. 633 (N.D. Ind. 1996); *Intermedics, Inc. v. Ventritex, Inc*., 139 F.R.D. 384 (N.D. Cal. 1991).

Indeed, in *Karn*—which CUB/Cook County previously cited before the ALJs to obtain testifying witness materials from Nicor Gas—the District Court adopted a "bright-line" test for the disclosure of all relevant materials considered by a party's testifying witness, even if such materials constitute opinion work product. 168 F.R.D. at 639-41. The *Karn* court identified several compelling interests in support of a bright-line standard as essential to the integrity of the truth-seeking process:

- *First*, without pre-trial access to all attorney-witness communications, opposing counsel may not be able to reveal any influence that counsel has achieved over the witness's testimony.

- *Second*, access to materials or information disclosed to a testifying witness in no way compromises the protections of the work product doctrine, which is intended to allow *counsel*—not testifying experts—the privacy and latitude to develop new theories or pursue particular avenues of investigation. Counsel's sharing of work

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[6] Because CUB/Cook County cannot support their assertion of protection under the attorney work product doctrine, their citation *Mlynarksi v. Rush Presbyterian St. Luke's Medical Center*, 213 Ill. App. 3d 427, 572 N.E.2d 1025 (1st Dist. 1991), is factually and legally inapposite.

[7] The courts have observed that "it would be foolish for the retaining party to use a testifying expert [to advise on strategy], as the communications would be an open book available for the opponent to review." *Chamberlain Group, Inc. v. Interlogix, Inc*., No. 01 C 6157, 2002 WL 653893, at *4 (N.D. Ill. Apr. 19, 2002) (*quoting Commonwealth Ins. Co v. Stone Container Corp*., 178 F. Supp. 2d 938, 945 (N.D. Ill. 2001).

product with a witness does not advance the goals of the doctrine but merely informs or influences the witness.

- *Third*, a bright-line test preserves the protections of the work product doctrine by leaving no uncertainty that a testifying witness's documents will be disclosed in their entirety.

168 F.R.D. at 639-41; *accord Barna*, 1997 WL 417847, at *2-3; *Intermedics, Inc.*, 139 F.R.D at 387-97.

In their Petition, CUB/Cook County seek to distance themselves from their prior reliance upon *Karn*, which reflects the majority position, through citation to an unpublished opinion, which has not been followed at any time by any court. (*See* Petition, p. 13) (citing *Trimec, Inc. v. Zale Corp*., No. 86 C 3885, 1992 WL 245602 (N.D. Ill. Sept. 23, 1992)). The ALJs did not credit this self-serving argument, and the Commission should not, either.

B. Illinois Law Clearly Requires Full Disclosure Of Relevant Matters Including Materials Authored Or Reviewed By A Party's Testifying Witness

CUB/Cook County devote much of their Petition to a newly contrived argument that Nicor Gas should be limited in its opportunity to prepare cross-examination of their testifying witness, Mr. Mierzwa. Illinois law provides no support for such a limitation which, as recognized by the ALJs, would violate the Company's due process rights and undermine the fundamental fairness of this proceeding. The Commission should uphold the ALJs' principled rejection of this argument.

Nicor Gas notes that CUB/Cook County initially did not object to the discovery at issue on the basis of such a limitation. Rather, they summarily asserted a privilege, without any factual or legal support, as to documents withheld. Faced with their inability to support any such privilege before the ALJs, CUB/Cook County asserted that the law is "vague" or "silent" on the requirement for a party to disclose all relevant materials in discovery, including those created or

reviewed by a testifying witness. Now upon review, CUB/Cook County argue that the Commission's Rules of Practice and/or the Supreme Court Rules somehow limit their discovery obligations.

While CUB/Cook County's argument is in many respects unrecognizable from the arguments presented below, it is equally without merit. For purposes of analysis, Nicor Gas begins with the Commission's stated policy that discovery should provide "full disclosure of all relevant and material facts to a proceeding." 83 Ill. Admin. Code § 200.340.

This policy is consistent with repeated holdings of the Illinois courts emphasizing that "[t]he purposes of litigation are best served when each party knows as much about the controversy as is reasonably practicable." *Mistler v. Mancini*, 111 Ill. App. 3d 228, 231-32, 443 N.E.2d 1125, 1128 (1st Dist. 1983); *accord Carlson v. General Motors Corp*., 9 Ill. App. 3d 606, 619-20, 289 N.E.2d 439, 449-50 (1st Dist. 1972). Discovery in Illinois is liberal and open so that a determination will rest on the merits, rather than upon legal tactics. *Mistler*, 111 Ill. App. 3d 228, 231-32, 443 N.E.2d 1125, 1128 (citations omitted).

The concept of relevance for purposes of discovery is broad under Illinois law. *Bauter v. Reding*, 68 Ill. App. 3d 171, 175, 385 N.E.2d 886, 890 (3d Dist. 1979); *see, e.g., Krupp,* 8 Ill. 2d at 41, 132 N.E.2d at 535. Importantly, relevance in discovery is determined by reference to the issues in a given case. *Bauter,* 68 Ill. App. 3d at 175, 385 N.E.2d at 890; *accord Pemberton v. Tieman*, 117 Ill. App. 3d 502, 505, 453 N.E.2d 802, 804 (1st Dist. 1983). As succinctly stated by the Illinois Appellate Court: "Something is relevant if it tends to prove or disprove something in issue." *Bauter,* 68 Ill. App. 3d at 175, 385 N.E.2d at 890.

Finally, the need for full and open discovery in the courts and at the administrative level is the same. *See Montgomery v. Dep't of Registration & Educ*., 146 Ill. App. 3d 222, 224-26,

496 N.E.2d 1100, 1102-03 (1st Dist. 1986); *McCabe v. Dep't of Registration & Educ*., 90 Ill. App. 3d 1123, 413 N.E.2d 1353 (1st Dist. 1980); *Wegmann v. Dep't of Registration & Educ*., 61 Ill. App. 3d 352, 377 N.E.2d 1297 (1st Dist. 1978).

The materials created and reviewed by Mr. Mierzwa in his preparations to testify are relevant to the issues in this proceeding and, thus, are discoverable. The ALJs had the opportunity to review these materials and determined that the inescapable damage in allowing CUB/Cook County to withhold them—and preclude a full cross-examination of their testifying witness—outweighs these parties' unsupported privilege claims. While CUB/Cook County raise entirely new and novel arguments upon review, the same result applies.

Contrary to CUB/Cook County, the Commission's Rules of Practice do not contemplate limiting the scope of discovery upon testifying witnesses. CUB/Cook County assert that the "primary purpose" of Mr. Mierzwa's reports and email communications "is not to provide facts regarding this case." The Commission's Rules recognize no such vague and equivocal limitation of its liberal and open discovery regime, which would render the discovery process uncertain and virtually unmanageable.

Moreover, Mr. Mierzwa's reports and emails are an obvious and essential source of impeachment materials. As previously noted, CUB/Cook County through Mr. Mierzwa's opinions are seeking approximately $143 million in refunds from Nicor Gas. As the ALJs recognized, the Company has the right to test the credibility and reliability of Mr. Mierzwa's opinions. In the simplest example, suppose Mr. Mierzwa's final testimony excludes facts or conclusions favorable to Nicor Gas reflected in his earlier reports and communications. Under such circumstances, the Company is entitled to ask, "Why?" More pointedly—if, based on a review of all these materials, it appears that the opinions contained in Mr. Mierzwa's testimony

have changed over time, including at the urging of these parties or their counsel—the Company is entitled to explore this change in Mr. Mierzwa's "independent" opinion, as well.

CUB/Cook County's assertion that full discovery into Mr. Mierzwa's reports and communications somehow would be contrary to the purpose of Illinois Supreme Court Rule 213 is equally unfounded.[8] While not entirely clear or distinguishable from their privilege argument, the gist of CUB/Cook County's argument on Rule 213 seems to be that Nicor Gas should be limited in its cross-examination of Mr. Mierzwa to use of his pre-filed testimony and certain documents of his own choosing.

Applicable authority—and common sense—dictate a contrary result. In the first place, Rule 213 contains no such limitation. *See* Ill. Sup. Ct. R. 213(f)(3)(iii) (requiring production of "*any* reports prepared by the witness about the case") (*emphasis provided*). Furthermore, documents created or even merely consulted by testifying witnesses are ordinarily discoverable. While Illinois case law on the question of expert discovery is limited, the Federal courts expressly have declined to allow selective disclosure of testifying witnesses' documents, because full disclosure is essential to ensure effective cross-examination and to prevent an expert from adopting a "sanitized" presentation at trial purged of unfavorable facts or opinions. *See, e.g., In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1442, 1444 (D. Colo. 1988) ("[A]n expert 'relies' upon material he finds unpersuasive as well as material supporting his ultimate position").

[8] While Rule 213 does not apply directly in Commission proceedings, the ALJs may find guidance in the Supreme Court Rules for purposes of their rulings on procedural matters, including those related to the conduct of discovery.

C. The Commission Should Not Accept CUB/Cook County's Invitation To Carve Out A New Exception To The Law Of Discovery

Failing all else, CUB/Cook County assert that the ALJs' Ruling requiring them to produce identified relevant materials authored or reviewed by their testifying witness represents a change in discovery practice and policy before the Commission. (Petition, pp. 14-15). Nothing could be further from the truth.

Parties offer opinion testimony by retained witnesses in Commission proceedings in the ordinary course. The Commission's Rules of Practice require full disclosure of all the facts relevant to the issues in a proceeding, including materials created or consulted by opinion witnesses. This requirement is not arbitrary. Opinion witnesses, for better or worse, often are perceived as offering whatever testimony would serve the interests of the retaining party—regardless of the truth. Thus, the integrity of the truth-seeking process requires that an opposing party have a complete opportunity to review and analyze all the relevant facts and, as appropriate, to make use of them against the witness.

In their Petition, CUB/Cook County seek an exception to the full disclosure requirement for their testifying witness's documents and communications or, in the alternative, a "process" to reconsider what well-established law already holds. (*See* Resp., pp. 10-11). The Commission should not accept this invitation to create a double-standard under its discovery policy or to engage in any review intended to achieve the same. Consistent with the ALJs' Ruling, Nicor Gas respectfully submits that the protections afforded the truth-seeking process through the enforcement of ordinary reciprocal discovery in this proceeding outweigh any inconvenience to CUB/Cook County to comply with the same.

IV.
Conclusion

For all these reasons, Nicor Gas respectfully requests that the Commission uphold the January 15, 2004 Ruling of the ALJs requiring disclosure of CUB/Cook County's testifying witnesses' relevant documents, denying the Petition for Interlocutory Review filed by these parties, and granting such other relief as is just and proper.

Dated: February 9, 2004

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
D/B/A NICOR GAS COMPANY

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CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, hereby certify that I served a copy of Northern Illinois Gas Company d/b/a Nicor Gas Company's Response To Citizens Utility Board's And Cook County State's Attorney's Office's Petition For Interlocutory Review upon the service list in consolidated Docket Nos. 01-0705/02-0067/02-0725 by email on February 9, 2004.

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Thomas A. Andreoli